

December 3, 2007

**STATE OF SOUTH DAKOTA
OPEN MEETINGS COMMISSION**

IN THE MATTER OF OPEN MEETING)	FINDINGS OF FACT
COMPLAINT 06-02)	CONCLUSIONS OF LAW
SOUTH DAKOTA BOARD OF REGENTS)	AND REPRIMAND

Mark A. Reedstrom, Commission member

INTRODUCTION

South Dakota has enacted a statute requiring meetings of state boards and local governing bodies to take place in public forum, SDCL Ch. 1-25. Those meetings may only take place after compliance with notice requirements found in SDCL 1-25-1.1. Executive or closed meetings may be held for the sole purposes of discussing (1) the qualifications, competence, performance, character or fitness of any public officer or employee or prospective public officer or employee; (2) discussing the expulsion, suspension, discipline, assignment of or the educational program of a student; (3) consulting with legal counsel or reviewing communications from legal counsel about proposed or pending litigation or contractual matters; (4) preparing for contract negotiations or negotiating with the employees or employee representatives; (5) discussing marketing or pricing strategy by a board or Commission of a business owned by the state or any of its political subdivisions, when public discussion may be harmful to the competitive position of the business. This specific directive is found at SDCL 1-25-2. Violation of this statute is a Class 2 misdemeanor.

DISCUSSION AND DECISION

This matter comes before the Commission under the complaint of Ms. Betty Breck, a concerned citizen and resident of Groton, South Dakota. On February 20, 2006, the South Dakota Board of Regents received a copy of a document prepared by the Complainant alleging four violations of South Dakota's public meeting laws, SDCL Chap. 1-25, as follows:

1. Discussing and acting upon items not on the agenda;
2. Discussing in executive sessions items not allowed to be discussed in executive session;
3. Discussing in executive session items not specified in the motion for executive session;

4. Taking actions in executive session.

Summary of Background, Evidence and Testimony.

The material subject matter resonating throughout the Complainant's four grievances concerns discussions allegedly held in executive sessions of the Board of Regents about acquiring land to create a permanent location for the state's public university system in Sioux Falls; more specifically, the purchase of 263 acres of land in northeast Sioux Falls, South Dakota, owned by the Department of Transportation (DOT). Ms. Breck claims the subject of acquiring land for a new Sioux Falls campus never appeared on any Regent's agenda until January 2006. According to Ms. Breck, news of the planned acquisition of the property first appeared in a press release issued by Governor Mike Rounds issued on January 3, 2006. In that release, the Governor announced he was seeking legislative approval to approve the acquisition of the land and seeking an appropriation of \$8 million to construct a classroom building at the new site. The press release also referenced an announcement by Regent's president, Harvey Jewett, that Great Plains Education Foundation, Inc. had agreed to gift the Board of Regents the sum of \$5.8 million to acquire the 263 acres proposed for the site.

Following the Governor's public announcement, the Board of Regents took two official actions at a special meeting on January 16, 2006. The Board approved a resolution accepting the gift offered by Great Plains Educational Foundation, and a resolution adopting a preliminary plan for the classroom building on the proposed site. Both resolutions were conditional upon legislative approval. Thereafter, the Governor's Office introduced HB 1238 (authorizing the Board to purchase the site) and HB 1244 (authorizing an appropriation to build the classrooms).

On February 17, 2006, an article appeared in the Aberdeen American News, which alluded to a "secret plan" conceived by the Board of Regents and Governor Rounds in 2005 concerning acquisition of the DOT land for the new Sioux Falls campus. The South Dakota Legislature adopted both bills on February 28, 2006. The Governor signed the two bills into law on March 8, 2006.

From these series of events, Ms. Breck concludes the Board engaged in "master planning" concerning the land acquisition and future of the Sioux Falls site (then named USDSU) outside of agendized public meetings and beyond the purview of the open meeting or sunshine laws. Ms. Breck summarized her testimony stating that all of these items should have been discussed in public; that there was no public input; and that secrecy breeds distrust. Ms. Breck's individual complaints #1 through #4 contain common elements of her overall theory, but will be addressed individually per alleged violation.

DISCUSSION AND DECISION

1. Discussing and acting upon items not on the agenda.

Based upon the testimony and exhibits offered and received at the July 24, 2006, open meeting Commission hearing, the Complainant failed to offer evidence of any specific discussions or actions taken by the Board, sitting as a quorum, that were not on its official agenda. Complainant's theory that "master planning" must have occurred during executive sessions conducted from April through December 2005, does not support this claim, as notice of all executive sessions and the general subject matter thereof did appear on the Board of Regent's agendas. Whether master planning should have been discussed in executive sessions is the subject of Complainant's second allegation.

Regarding items not on the agenda, Ms. Breck testified that the annual reports of USDSU since 1996 contain only general statements about acquiring land. By the time the 2005 annual report was issued, she contends, the Regents were secretly considering sites. Ms. Breck pointed to an excerpt in the 2005 report [presented to the Board at its June 29-July 1, 2005, public meeting] noting that: "Master planning is underway to analyze and evaluate sites and building strategies." When asked by Chairman Foley how she knew this, Ms. Breck admitted her "only source of information was the newspaper."

Dr. James F. Shekleton, general counsel for the Board of Regents, testified for the Board. Dr. Shekleton offered submissions and exhibits referencing a decade-long compilation of public records, agendas and minutes, and annual USDSU reports to demonstrate that planning for the expansion of USDSU was in progress for the past ten years. On this initial complaint, however, the relevant inquiry is whether the discussions contained in the meeting minutes were items properly noticed on the corresponding agendas. This Commission's examination of those minutes reveals no discussions or actions taking place beyond the items noticed in agendas. The Complainant offers no evidence of other occasions wherein the Board, acting as a quorum, engaged in meetings, discussions, or actions not properly noticed and agendized.

While the public record shows a consistent and sustained effort by the Board to find new avenues to address the growth of the state's university system, the record is silent as to the identification of the DOT property as the proposed site for that campus. That effort, according to Respondent, began in earnest following the 2005 legislation that authorized the Board of Regents to implement long-term capital projects financed through the issuance of revenue bonds by the South Dakota Building Authority. That Act, the Board contends, necessitated efforts by the Board to identify land that could

meet the legal requirements to implement the general authorization. The evidence and records bear witness to a long course of public discussions, reports, and initiatives that culminated with the bills passed by the 2006 legislature.

The ultimate decision to purchase land for the public university campus was not a Board of Regent's decision. The South Dakota Legislature made that decision in an appropriate and fully public manner. Public input was available through that process. The public also had the opportunity to offer input into the official actions taken by the Board at the January 16, 2006, special meeting. The South Dakota Legislature is the only public body having authority to make the decisions and take the actions Ms. Breck complains about. We find the items discussed in *open* sessions were properly noticed on the Board's agendas. Therefore, the Commission finds that the Complainant's assertions that the Board discussed and acted upon items not on the agenda without merit and finds in favor of the Board of Regents.

2. Discussing in executive sessions items not allowed to be discussed in executive session.

SDCL 1-25-2 clearly sets out the permitted topics or subject matter of discussion permitted by a public body in executive session. As is the nature of executive sessions, it is difficult to determine the actual matters discussed in such sessions, unless an action occurs following the Board's rise from executive session, giving clues to the matters discussed. In this case, the Governor's press release and the Board's official actions on January 16, 2006, gave two big clues about the nature of the *contract matters* being discussed in executive session throughout 2005. Obviously, the 263-acre DOT site had been pre-selected and agreements were in place regarding the terms and conditions of its purchase. The \$5.8 million dollar grant offered by Great Plains Education Foundation was in place and part of the global deal. A Preliminary Facility Statement for a new 50,000 square foot \$8 million dollar classroom and administrative building was approved.

The fact these actions were not made public until January, 2006, lends credence to Complainant's assertions that the Board must have discussed "land acquisition plans, including discussion of the need for the acquisition of additional real property, identification of property to be acquired and an explanation of the basis for selecting that property, proposed funding sources, and alternative acquisition plans."

Dr. Shekleton, the Board's legal counsel, does not dispute Ms. Breck's assertions that these kinds of discussions took place in executive sessions from April through December 2005. He recalls: "By April 2005, the time was ripe to initiate the serious preliminary work of (a) identifying a location that could meet the manifest need to

accommodate USDSU growth, (b) reaching an agreement about the consideration for the real property, (c) settling on a transaction structure that would comply with the implicit limits on government authority and with the requirements for bond financing, and (d) preparing to obtain such additional authorization as may be necessary.” In this case, Dr. Shekleton maintains these preliminary negotiations and agreements were necessary to complete before the USDSU proposal was made public, so that it could be presented for official action with the “proposed structure and the money on the table.” “Only after the Board had secured the agreement of the owners on all such preliminary matters’, according to Dr. Shekleton, ‘would there be a proposal to consider for approval.”

The Commission takes no issue with the assertion that it was necessary to resolve certain agreements and preliminary matter before presenting them for official action, gubernatorial support, or legislative approval. The issue before the Commission is whether these preliminary matters should have been discussed publicly in an open meeting. The Board takes the position that these preliminary matters fall under the *contractual matter* exception for executive session, in particular SDCL 1-25-2(3). The Board argues that contracts cannot be negotiated in the abstract and involve complex legal issues, such as contractual capacity, consideration, duration, and performance.

This Commission agrees that legal issues are prevalent in all contracts. Legal advice, however, is not always needed to create a valid contract. Most commonly, legal issues are intermixed with the factual or substantive considerations relative to contract formation. The Board argues that the question involving the selection of one tract of land or another cannot be separated from the legal considerations that arise based upon the legal capacity of the owner, the transaction, the form of consideration, or hosts of other issues. We disagree.

This Commission has held that consideration of entering contracts is not in and of itself a proper subject for a closed session under SDCL 1-25-2. *In the Matter of the Complaint of South Dakotans for Open Government Against the South Dakota Science and Technology Authority* (Opinion issued February 20, 2007). The Commission has determined the exception found under SDCL 1-25-2(3) should not be read as two distinct exceptions: one for consultations with legal counsel about pending litigation and one for discussions of contractual matters generally. *Id.* Rather, the correct interpretation is one exception for consultations with legal counsel, which consultations may relate to litigation matters or to contractual matters. *Id.* It is the view of the Commission that general discussions of contractual matters must be discussed in open meetings. Only the legal matters relating to those contracts may be discussed in executive session. As the Commission cautioned in *South Dakota Science and Technology, supra*, this may require going in and out of executive sessions numerous times during the course of a particular

discussion. The public's right to have its business conducted, insofar as possible, in public, outweighs the burden of compliance.

It is clear from the evidence that the aforementioned contractual matters discussed in executive sessions from April through December, 2005, exceeded the permissible scope of topics allowed by SDCL 1-25-2(3). It is evident the Board discussed a host of contractual matters not covered by the legal consultation requirement. Discussions about topics such as purchase price, site location, acres, costs and benefits, suitability, needs assessment, building plans, and certainly the overall decision to select a new permanent location for the state's university system were topics that did not require statutory or common law interpretation. These discussions were factual and substantive in nature and should have been discussed in the open meeting format. Because we find that the Board of Regents discussed matters beyond the permissible exception, they violated the open meeting law. Pursuant to statute, we reprimand it for that violation.

3. Discussing in executive session items not specified in the motion for executive session.

A review of the minutes of the Regent's meetings show the Board dissolving into numerous executive sessions throughout their meetings in 2005. The minutes of these meetings show that closure motions were made prior to each session outlining the purpose of such session using general language, such as: *personnel matters; pending and proposed litigation; collective bargaining; contract negotiation; and to consult with legal counsel*. The minutes that follow the Board's rise from executive sessions report that such topics were discussed, again using the same general-purpose language, on all occasions, except for August 11, 2005.

At the August 11, 2005, meeting, the closure motion announced the Board retiring into executive session to discuss *personnel matters* only. The report following the Board's rise from executive session references the Board having discussed *personnel matters, collective bargaining matters, matters related to contract negotiations and pending and prospective litigation*. Dr. Shekleton testified this discrepancy was due to a clerical error, and what was read into the report of executive session was inaccurate. He explained that the clerical staff prepares both the executive session motion and the subsequent report. Dr. Shekleton made several handwritten notations on the prepared report that the secretary was apparently unable to follow and then read into the report several items that were not considered on August 11, 2005.

Dr. Shekleton testified that no item was discussed in that executive session that was not on the agenda. Dr. Shekleton admitted he was responsible for that oversight, not the secretary. The Commission finds the testimony of Dr. Shekleton to be credible and

appreciate his candor. Although a clerical error caused a discrepancy to appear in the minutes, we find that no matters were discussed in executive sessions that were not generally described in the agenda. Thus, no violation occurred and we find in favor of the Board of Regents.

4. Taking action in executive session.

The Complainant's fourth allegation, in sum and substance, encompasses the grievances complained about in her second allegation -- that the Board engaged in master planning discussions beyond the scope permitted in executive session. That topic has been addressed above. To the extent this complaint alleges the existence of *official action* within the meaning of SDCL 1-25-2; we find this complaint unsubstantiated. In terms of the 20 separate violations mentioned in the Complainant's presentation, there are no specific official actions were identified. The Commission cannot rule on conjecture and must confine its deliberations to the record. The record is devoid of any legally binding contracts, agreements, or actions having been entered or consummated in executive sessions.

That certain matters were discussed in executive sessions that should have been public, does not denote official action. Complainant best describes the matters discussed in executive session as *master planning*. Discussions concerning the selection of one site or another, and the preliminary matters inherent in negotiating the purchase of such site, did not give rise to any legally enforceable contract or obligation. It gave rise to a proposal that required legislative approval to complete. The only two official actions of record were taken at the January 16, 2006, special meeting – the acceptance of the grant conditioned upon legislative authorization to purchase the land, and the approval of the preliminary facilities plan. Those matters were considered in the legislature, a proper forum for public debate. Finding the Complainant's fourth allegation unsubstantiated, we rule in favor of the Board of Regents.

FINDINGS OF FACT

1. The South Dakota Board of Regents is a related board or a political subdivision of the State of South Dakota as those terms are used in SDCL 1-25-1.
2. That Complainant failed to show that the Board of Regents discussed or acted upon items not on their agenda between April and December 2005.
3. That on or between April and December 2005, the Board of Regent held closed meetings or executive sessions for the purpose of discussing contractual matters, which discussions exceeded the scope of the permitted exception allowing discussions with

legal counsel concerning contractual matters.

4. That Complainant failed to show that the Board of Regents discussed items in executive session that was not at least generally described in their closure motions for executive session.

5. That Complainant failed to show that the Board of Regents took official actions in executive session.

CONCLUSIONS OF LAW

1. The Board of Regents is an entity subject to the provisions of the open meetings law, SDCL ch. 1-25.

2. The Board of Regent's discussion of contractual matters in closed sessions between April and December 2005 that were beyond the scope of SDCL 1-25-2(3) was a violation of the open meetings law.

3. The Board should be publicly reprimanded.

REPRIMAND

The Board of Regents is hereby publicly reprimanded for violation of the South Dakota open meetings law.

Commission Chair Steele and Commission members Beck, Brenner, Reedstrom and Rothschadl concur.